NO. 49249-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL MONTOYA,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITSAP COUNTY

The Honorable Sally F. Olsen, Judge

BRIEF OF APPELLANT

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RULES, STATUTES AND OTHER AUTHORITIES

A. ASSIGNMENTS OF ERROR

1. Allowing testimony regarding appellant's previous stalking behavior towards the alleged victim's cousin was improper under the Washington Rules of Evidence.

2. The evidence is insufficient to sustain appellant's stalking conviction.

Issues Pertaining to Assignments of Error

1. Did the court err under ER 404(b) in admitting testimony that appellant previously engaged in "stalking behavior" towards the alleged victim's cousin?

2. Is the evidence insufficient to support appellant's stalking conviction where the State failed to present evidence establishing that the alleged victim reasonably feared that appellant would physically injure her?

B. STATEMENT OF THE CASE

1. Procedural Facts

On April 12, 2016, Mr. Montoya was charged with one count of felony stalking against Arlene Deann Stormo. CP 1. The conduct was charged as a felony based on an allegation that Mr. Montoya had previously been convicted of stalking. CP 1-7. The State amended the information to change the name of the alleged stalking victim to Amy Leanne Stormo and to expand the period charged. CP 29-31.

Mr. Montoya filed a motion to bifurcate the trial issues into two inquiries: (1) whether he committed the act of stalking under RCW 9A.46.110(1)(a)-(c) and (2) whether he had a prior conviction for stalking. CP 26-28. Mr. Montoya argued that, under State v. Roswell, 165 Wn.2d 186, 198, 196 P.3d 705 (2008), the court could bifurcate the question of whether he had a qualifying prior offense from the question of whether he committed the current stalking offense and that it should do so to "constrain the prejudicial effect of [the] prior conviction upon the jury." CP 26-28. On the same day, Mr. Montoya filed a motion in limine requesting "exclusion of any reference by any witness of the State to the underlying facts of Defendant's prior conviction of [s]talking" and

"exclusion of any testimony by any witness of the State referring to Defendant as a stalker." CP 24-25.

The state opposed the motion to bifurcate, arguing that although it might be prejudicial, admission of prior convictions does not necessarily deprive a defendant of a fair trial. 1RP 17.[1]

During argument on the motion to bifurcate, Mr. Montoya argued that allowing evidence of his prior conviction would be inadmissible propensity evidence under ER 404(b). 1RP 13. The state conceded that evidence of the facts underlying Mr. Montoya's prior stalking conviction would be "classic 404(b)," but urged the court to allow the testimony, arguing that it was relevant to whether Ms. Stormo's fear of Mr. Montoya was reasonable. 1RP 20-21. The State also made a motion in limine to admit Ms. Stormo's knowledge of who Mr. Montoya was based on her awareness of Mr. Montoya's previous conviction. 1RP 20.

The court granted Mr. Montoya's motion to bifurcate but allowed the state to illicit testimony that Mr. Montoya previously "engaged in stalking behavior, stalked a family member [of Ms. Stormo's], but without going into any of the details." 1RP 29. The

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[1] This brief refers to the verbatim report of proceedings as follows: 1RP—June 27, 2016 and July 5, 2016; 2RP—July 6, 2016 and July 7, 2016.

court found the evidence relevant to the reasonableness of Ms. Stormo's fear of injury and therefore admissible under ER 404(b). 1RP 31, 33, 46.

A jury was sworn and heard evidence from Officer Stephen Morrison, Arlene Stormo, and Amy Stormo. 1RP 157-162, 2RP 167-189. At the close of the State's case, Mr. Montoya made a motion to dismiss, arguing the State did not present sufficient evidence that a reasonable person would have feared being injured by Mr. Montoya. 2RP 195-197. The court denied the motion. 2RP 197. Mr. Montoya did not testify and did not present any witnesses. 2RP 165.

The jury found Mr. Montoya guilty, and the court imposed a sentence of 20 months. CP 52, 55-56. Mr. Montoya filed a timely notice of appeal. CP 68-79.

2. Substantive Facts

Amy Stormo owned a coffee stand business called Stormy Espresso with her mother, Arlene Stormo, 2RP 167-68. Becky Stormo is Amy's cousin.[2] 2RP 174. Michael Montoya was a customer of that stand on at least two occasions. 2RP 169-171.

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[2] Since several individuals share the same last name and to avoid confusion, this brief refers to Amy Stormo as "Ms. Stormo," her mother as "Arlene Stormo," and her cousin as "Becky Stormo."

According to Ms. Stormo, in December of 2011 and again in January of 2012, she received text messages that she determined were from Mr. Montoya because she called the associated number and the voicemail said "Montoya." 2RP 176. Ms. Stormo testified she was familiar with the name Michael Montoya because in late 2008 and in 2009 Montoya had exhibited "stalking behavior" toward her cousin Becky. 2RP 174-175. When she got the text messages, she called the police to report it and she and her mother had a security system installed in the coffee shop. 2RP 177. She also told Mr. Montoya to leave her and her family alone. 2RP 178. Later, on cross examination, Ms. Stormo appeared to clarify that the contacts in December and January were in December 2012 and January 2013 rather than in December 2011 and January 2012. 2RP 185-186.

Ms. Stormo testified that on February 15, 2013, she sought a protection order against Mr. Montoya, which was granted because he did not show up at the hearing to contest it. 2RP 178, 186. She confirmed that he did not contact her for the entire year the order was in effect. 2RP 179. She also testified that she had no contact from him from the time the order expired on February 15, 2014 until August of 2015. 2RP 186-187.

Ms. Stormo next heard from Mr. Montoya on August 13, 2015 when he made two posts to the coffee shop's public Facebook page. 2RP 179-80. Her mother called her to tell her about the posts. 2RP 180. They read "Mike Montoya wants to talk to Beckies his god sister 425 236 0023 jesus forward to my sister the billionaire am loved her," and "I wanna talk to Becki stormo or Amy stormo 425 236 1479 its Beckies famous rapper godbrother please jesus." Exhibits 1-2. Ms. Stormo testified that these posts left her "scared and worried" Montoya would not leave the family alone. 2RP 181.

Ms. Stormo testified that following these posts, she learned from her mother that Mr. Montoya visited the coffee shop in February of 2016 and posted about it on his own Facebook page. 2RP 181-182. The first post read:

> I got 25 million dollars to give to every stormo family member if amy calls me and takes me to get my money with none of the illuminati initiation bullshit envolved to all you non believers or people that don't cooperate with me and think I'm crazy may you remain oblivious to the truth and live like sheep montoya over and out.

Exhibit 5. The second post read:

> Yesterday I went to port orchard and stopped by at stormy espresso to give this lady my number to give to Amy stormo to call me and I know she got it an

> tried to call me but I'm not getting any calls or texts because the illuminati has my phone tapped and they block my phone calls cause they don't want me to have any friends.

Exhibit 4.

According to Ms. Stormo, after Mr. Montoya came by the shop February 2016 and posted about it on his Facebook page, her mother called the police and she went to get a protection order against Mr. Montoya but was never able to serve it on him. 2RP 183-84. She testified that all of the contacts with Mr. Montoya left her "scared and worried" and she just wanted them to stop. 2RP 183-184.

Arlene Stormo testified that on February 21, 2016, Mr. Montoya came to the coffee stand and left his phone number on the receipt for his drink, which was an unusual thing for a customer to do. 2RP 169-170. Mr. Montoya came to the coffee stand again on April 9, 2016, spoke with her, and "said he wanted to be with them, the girls, Becky." 2RP 171. She described him as "looking about wildly. His eyes were darting different places. He appeared very agitated, nervous." Id. She contacted the police, and officers responded to the coffee stand. Id.

The officer who arrived at the coffee stand detained Mr. Montoya, read him his Miranda[3] rights, and spoke with him briefly. 1RP 159-161. Mr. Montoya told him that he was travelling from Lynwood to the Shelton or Belfair area and that he stopped in for coffee on the way. 1RP 161-62. When the officer asked if he knew anyone at the coffee stand he replied, "A Stormo might be working here." 1RP 162. He was compliant with all that the officer asked of him. Id.

C. ARGUMENT

1. THE COURT ERRED IN ALLOWING TESTIMONY THAT MR. MONTOYA PREVIOUSLY ENGAGED IN STALKING BEHAVIOR TOWARDS MS. STORMO'S COUSIN

Washington Rule of Evidence 404 prohibits the admission of evidence of a defendant's prior crimes or bad acts to show that the defendant has a propensity to commit a crime. ER 404(b). Under rule 404(b), a defendant's prior bad acts can only be admitted for a non-character purpose if the court finds by a preponderance of the evidence that the act occurred, identifies the reason for introducing the evidence, determines that the evidence is relevant to an element of the charged crime, and finds that the probative value of

[3] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

the evidence outweighs the prejudicial effect. In re Detention of Coe, 175 Wn.2d 482, 493, 286 P.3d 29 (2012). If a court errs in introducing evidence under rule 404(b), the conviction must be reversed if there is a reasonable probability the evidence materially affected the outcome. State v. Everybodytalksabout, 145 Wn.2d 456, 468-469, 39 P.3d 294 (2002).

In some cases, a prior crime can be an element of the charged offense. Where a prior conviction is an element of the charged offense, a court may bifurcate the proceedings because of the highly prejudicial nature of evidence of prior crimes. Roswell, 165 Wn.2d at 198. A decision to bifurcate the jury's review of prior offenses is a matter of the trial court's discretion. Id. at 196. In addressing the question of bifurcation, an important factor is the "inherently prejudicial" nature of prior convictions. State v. Oster, 147 Wn.2d 141, 148, 196 P.3d 705 (2006). Because prior convictions can be highly prejudicial, "trial courts may exercise their sound discretion to reduce unnecessary prejudice" by bifurcating the jury's consideration of the prior offense. Roswell, 165 Wn.2d at 198.

The court in this case properly exercised its discretion to bifurcate the jury's examination of whether Mr. Montoya had a prior

conviction when it granted Mr. Montoya's motion arguing that such evidence would have been unduly prejudicial. The court erred, however, in allowing essentially the same testimony to be heard by the jury under 404(b). Allowing the testimony under 404(b) was error because the testimony was not relevant to the determination of an element of the charge, namely whether Ms. Stormo reasonably feared that Mr. Montoya intended to injure her or another person. Moreover, the testimony was highly and improperly prejudicial.

Generally, relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Before a court may allow evidence of a prior bad act under rule 404(b), it must first find that the evidence is relevant "to prove an *element* of the crime charged." Coe, 175 Wn.2d at 493 (emphasis added). The question of relevance in this case is, therefore, limited to that which would make the elements of stalking more or less likely. The elements of stalking require that a person

> (a). . . intentionally and repeatedly harasses or repeatedly follows another person; and

> (b) the person being harassed or followed is placed in fear that the stalker intends to injure the person, another person, or property of the person or of another person. The feeling of fear must be one that a reasonable person in the same situation would experience under all the circumstances; and
> (c) The stalker either:
> (i) Intends to frighten, intimidate, or harass the person; or
> (ii) Knows or reasonably should know that the person is afraid, intimidated, or harassed even if the stalker did not intend to place the person in fear or intimidate or harass the person.

RCW 9A.46.110(a)-(c).

The State argued under 404(b) that Mr. Montoya's conviction for stalking Becky Stormo was relevant to the question of whether Ms. Stormo had a reasonable fear that Mr. Montoya would injure her or another person. 1RP 20-28. The trial court allowed testimony that "Mr. Montoya engaged in stalking behavior, stalked a family member [of Ms. Stormo], but without going into any of the details." 1RP 29. The court reasoned the evidence was relevant

> because it goes directly to her fear that he had stalked a family member prior to 2012. Because that gives it context for [sic] she's receiving – she is receiving a text [from someone] she hasn't heard of when she hears the name she's aware of the prior stalking against a family member.

Id.

The court erred in allowing testimony about "stalking behavior" or about the fact that Mr. Montoya "stalked" a family member because that evidence does not provide information to the jury about whether Ms. Stormo reasonably feared *injury* as required by the stalking statute. The testimony does not describe what Mr. Montoya did. It does not indicate whether his behavior was violent or threatening or whether it was something merely annoying to Becky Stormo. It does not make it more likely that Ms. Stormo's fear of bodily injury was reasonable because it does not actually tell the jury what happened. It only serves to suggest that because Mr. Montoya engaged in "stalking behavior" previously, he also stalked Ms. Stormo.

Not only was this evidence irrelevant, it is exactly the type of propensity evidence prohibited by ER 404. The court acknowledged the high degree of prejudice caused by such evidence when it analyzed the effect of a prior conviction in its bifurcation analysis. It noted,

> [A] jury try, try as we might, there's a gut reaction here, someone being convicted of the exact same crime is kind of . . . "bad enough" in and of itself.
>
> If they hear that it's a family member of this very same victim, the level of prejudice is going up. . . .

1RP 24.

Although the phrase "stalking behavior" is not exactly the same as evidence of a prior conviction for stalking, the language is so similar and lacking in descriptive value that it carries exactly the same amount of dangerous prejudice. Because of the absence of probative value of the evidence and its highly prejudicial nature, testimony that Mr. Montoya engaged in "stalking behavior" should not have been allowed under rule 404(b).

The admission of this evidence prejudiced Mr. Montoya because without it, a jury would likely not have found beyond a reasonable doubt that Mr. Montoya stalked Ms. Stormo. Without the evidence that Mr. Montoya engaged in "stalking behavior" towards Becky Stormo, the jury only heard that – prior to the charged period of August 13, 2015 through April 9, 2016 – he sent her unwanted text messages in December 2011 and January 2012 or possibly December 2012 and January 2013. 2RP 176, 185-86. And, during the period charged, jurors heard only that Mr. Montoya made two posts to the public Facebook page of the coffee stand on August 13, 2015, 2RP 179-180; visited the coffee stand on February 22, 2016 when Ms. Stormo wasn't there, left a message

for Ms. Stormo to call him, and posted about it on his Facebook page; 2RP 181-82; and visited the coffee stand again on April 9, 2016. 2RP 169-171. Even assuming this evidence could be deemed sufficient to prove stalking, it is apparent the State's case was not strong.

The trial judge recognized the prior stalking evidence was extremely prejudicial. It should not have been admitted. Because the evidence prejudiced Mr. Montoya, this court should reverse.

2. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE STALKING CONVICTION BECAUSE THERE WAS NO EVIDENCE ESTABLISHING THAT A REASONABLE PERSON WOULD FEAR PHYSICAL INJURY FROM MR. MONTOYA.

In criminal prosecutions, due process requires that the State prove every fact necessary to constitute the charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is, when viewing the evidence in the light most favorable to the prosecution, whether there was sufficient evidence for a rational trier of fact to find guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). Where evidence is

improperly admitted, the determination of whether sufficient evidence was presented depends on analysis of the remaining evidence. State v. Hochalter, 131 Wn. App. 506, 516, 128 P.3d 104 (2006).

In this case, the properly admitted evidence was insufficient to support a finding that Mr. Montoya stalked Ms. Stormo. Moreover, even if the evidence of Mr. Montoya engaging in "stalking behavior" was not admitted in error, the evidence is still insufficient to prove beyond a reasonable doubt that Mr. Montoya stalked Ms. Stormo because that evidence does not shed any light on whether Ms. Stormo reasonably feared bodily injury.

As just discussed, without the evidence that Mr. Montoya engaged in "stalking behavior" towards Ms. Stormo's cousin, the jury only heard that he sent her unwanted text messages in December 2011 and January 2012 or possibly December 2012 and January 2013; that he made two posts to the public Facebook page of the coffee stand on August 13, 2015; that he visited the coffee stand on February 22, 2016 and then posted about it on his Facebook page; and, finally, that he visited the coffee stand on April 9, 2016.

It is clear Ms. Stormo was afraid of Mr. Montoya. She testified that she was afraid and about her efforts to obtain protective orders against him. 2RP 178, 181, 183-184. The question, however, is not whether there was evidence that she was afraid but whether there was sufficient evidence to support a conclusion that she *reasonably feared that he would injure her or another person*. The contacts he attempted to make with Ms. Stormo did not include anything that would make a reasonable person fear bodily injury. His text messages did not contain threats. 2RP 179-180, 182; see also 1RP 27 (prosecutor concedes "[t]here were no threats in the texting"). None of his contacts with the espresso stand were violent, and when he was there he did not make any threats. 2RP 169-170. The details of the contacts that the jury heard involved Mr. Montoya wanting Ms. Stormo to call him or contact him. On one occasion, he said he wanted to "be with" Ms. Stormo. 2RP 171. Additionally, there were clearly long periods of time when Mr. Montoya made no attempt to contact Ms. Stormo. Although the repeated attempts to contact her may have been unwelcome and may have actually caused Ms. Stormo to be afraid, the substance of the contacts is not enough for a jury to find

that any fear of injury from August 13, 2015 through April 9, 2016 was reasonable.

And even if the evidence that Mr. Montoya engaged in "stalking behavior" towards Ms. Stormo's cousin was properly admitted, it does not contribute any description of behavior that would support the fact that Ms. Stormo reasonably feared injury. There was no testimony about what the behavior was. There was no mention of prior threats or violence. There was no mention of whether the prior "stalking behavior" caused Becky Stormo to fear bodily injury. The fact that Mr. Montoya engaged in "stalking behavior" did not give the jury any actual additional evidence on a threat of injury. Therefore, even with the testimony of prior "stalking behavior," there was insufficient evidence for the jury to find, beyond a reasonable doubt, that Ms. Stormo reasonably feared injury from Mr. Montoya's behavior.

Because the evidence presented was insufficient to support the jury's verdict, Mr. Montoya's conviction should be reversed with prejudice. See State v. Smith, 155 Wn.2d 496, 505-506, 120 P.3d 496 (2005) (no retrial following reversal for insufficient evidence).

D. CONCLUSION

The court erred under ER 404(b) in allowing testimony that Mr. Montoya engaged in "stalking behavior" towards Becky Stormo as part of the State's proof that he stalked Amy Stormo. The evidence was irrelevant to any proper purpose and highly prejudicial in that it portrayed Mr. Montoya as one with a propensity to commit stalking offenses. With or without that improper evidence, the State's proof was inadequate to demonstrate, beyond a reasonable doubt, that Ms. Stormo reasonably feared bodily injury. This Court should vacate Mr. Montoya's stalking conviction.

DATED this 24th day of February, 2017.

Respectfully submitted,

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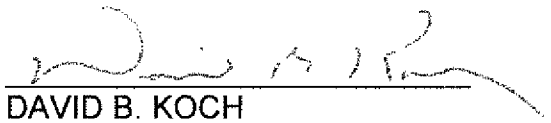

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